

No. 15128

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT W. BROWN & Co., Inc., ROBERT W. BROWN and
OLIVE W. BROWN,

Appellants,

vs.

LEONARD DE BELL (substituted for U. S. License Frame
Mfg. Co.),

Appellee.

BRIEF FOR APPELLANTS.

LEON & LYON,

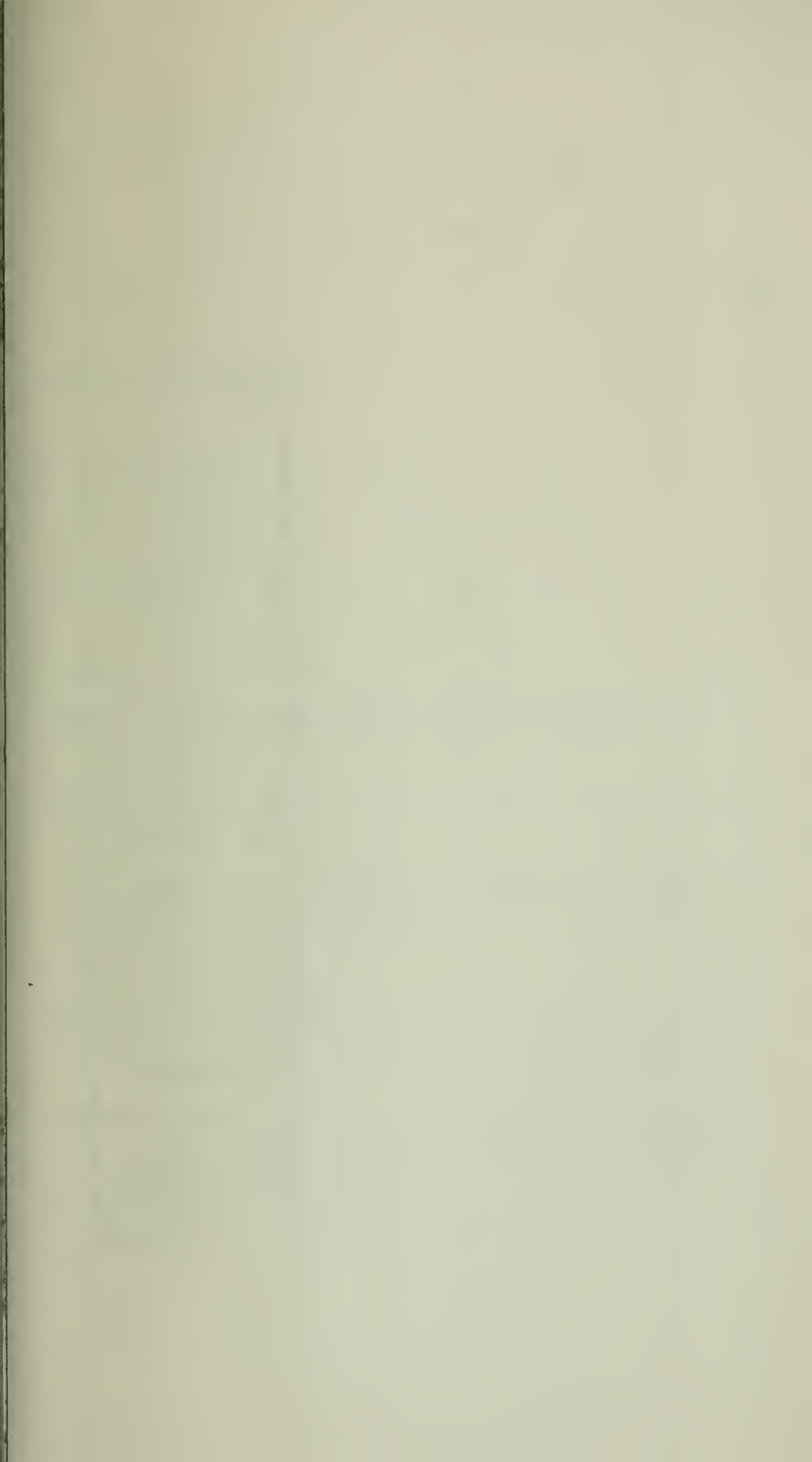
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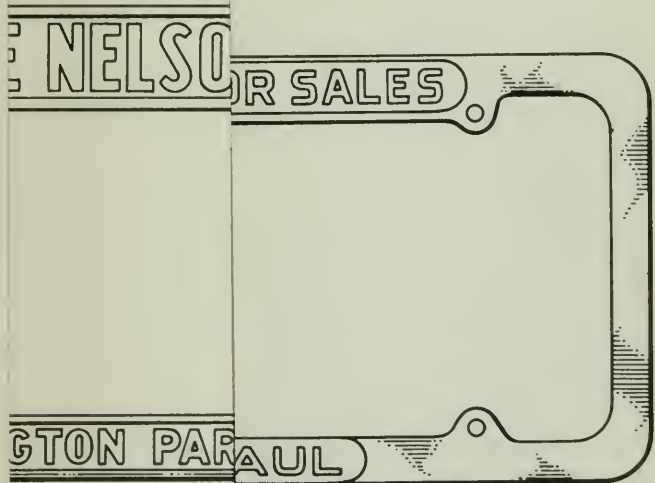
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TENT 167,878 (STERN AUTO)
'S EXHIBIT 'KHIBIT "J-1"



DEVICE (GLAS COMPANY)
'S EXHIBIT "IBIT "A-1"

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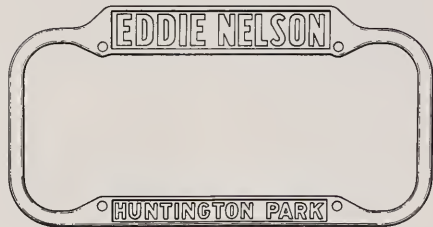
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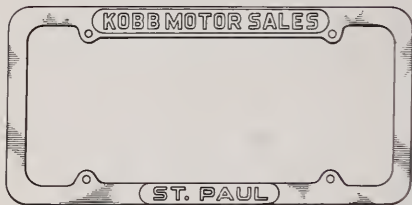
BESSOLO DESIGN PATENT 167,878, IN SUIT
PLAINTIFF'S EXHIBIT "1"



PRIOR ART (WESTERN AUTO)
DEFENDANTS' EXHIBIT "J-1"



ACCUSED DEVICE
PLAINTIFF'S EXHIBIT "2"



PRIOR ART (DOUGLAS COMPANY)
DEFENDANTS' EXHIBIT "A-1"

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Appellants,

vs.

LEONARD DE BELL (substituted for U. S. License Frame
Mfg. Co.),

Appellees.

BRIEF FOR APPELLANTS.

I.

Jurisdictional Statement.

This is an appeal from the judgment of the District Court (Hall, D. J.) holding plaintiff's Patent No. Des. 167,878 valid and infringed. The District Court of the United States for the Southern District of California, Central Division, has jurisdiction under 28 U. S. C. 1338(a) and 1400(b). Title 28 U. S. C. Section 1291 gives this Court jurisdiction of this appeal.

II.

Statement of the Case.

This is a suit for infringement of Letters Patent No. Des. 167,878 granted October 7, 1952 to Joseph C. Bessolo for license plate holder. Bessolo assigned the rights

to said patent to the original plaintiff, U. S. License Frame Mfg. Co., and before the trial Leonard De Bell was substituted as Plaintiff.

Defendant Robert W. Brown & Co. Inc. is a California corporation. The individual defendants Robert W. Brown and Olive W. Brown are husband and wife, and president and secretary, respectively, of the corporation. The corporation manufactures and sells die cast license plate frames. Prior to incorporation in July, 1953, the individual defendant Robert W. Brown obtained an order for license plate frames from an automobile dealer named Eddie Nelson, and Brown in turn placed the order with U. S. License Frame Mfg. Co. [R. 158]. That company, formerly plaintiff in this action, began deliveries [Ex. 3] under the order, but upon its failure to meet the delivery schedule Brown cancelled the order by letter [Ex. "P"] and proceeded to complete the order himself [R. 160]. He had a die constructed and employed another concern, Monarch Die Casting, to manufacture the license plate frames [Ex. 2] for him, and in this way he delivered the balance of the order to Eddie Nelson. The court below found that these license frames [Ex. 2] infringed the Bessolo design patent in suit.

The complaint contained a count for Unfair Competition [R. 6] but that was dismissed at the trial with consent of plaintiff, and it is not involved in this appeal.

In brief, the questions for determination here are:

- (1) Does the Bessolo design patent in suit embody any invention over the prior art?, and
- (2) Does the accused device contain that invention?

III.

Specification of Errors.

The following errors are specified as those which will be urged in support of this appeal:

I. The Court erred in holding that United States Letters Patent No. D-167,878 in suit is good and valid in law.

II. The Court erred in holding that appellants have infringed said patent by manufacturing and selling license frames exemplified by Exhibit 2.

III. The Court erred in holding that appellee is entitled to judgment for a permanent injunction and an accounting with costs.

IV. The Court erred in holding that license frames embodying the design of the patent in suit were substantially copied by numerous competitors in the field.

V. The Court erred in holding that the over-all appearance of the design of the patent in suit results in a new and ornamental design when viewed by the ordinary observer.

VI. The Court erred in holding that the license frames exemplified by Exhibit 2 are substantially identical with the design of the patent in suit, Exhibit 1.

VII. The Court erred in finding that the file wrapper references to Watts, Griffith and Overton, Exhibits G-1, G-2 and G-3, respectively, do not anticipate or negative invention of the patent in suit.

VIII. The Court erred in finding that the Patent Office Examiner did not err in allowing and issuing said patent.

IX. The Court erred in finding that the catalog Exhibit J and the Orester and McRuer patents, Exhibits M and N, were not as relevant as the reference patents located by the Patent Office Examiner and in no way disturb the validity of the patent in suit.

X. The Court erred in ruling that the date on Exhibit A-3 was obviously changed from 1949 to 1947.

XI. The Court erred in finding that the license frames made and sold by The Douglas Co., Exhibits A-1, A-5, and A-15, did not anticipate the design of the patent in suit.

XII. The Court erred in finding that The Douglas Co. license frame, Exhibit A-1, is in all material respects a substantial duplicate of the frames shown in the Watts patent, Exhibit G-1.

XIII. The Court erred in finding that the patent in suit demonstrates novelty and invention over The Douglas Co. frame, Exhibit A-1.

XIV. The Court erred in finding that The Douglas Co. license frames, Exhibits A-1, A-10 and A-15, are in all material respects the same as the frames illustrated in the file wrapper reference patents, Exhibits G-3 and G-2.

XV. The Court erred in holding that the manufacture and sale of license frames Exhibits C, D and K prior to the invention of the patent in suit is not convincing.

XVI. The Court erred in holding that the evidence as to the use of two cavity master dies before the patent in suit to make frames similar to Exhibits C, D and K is neither convincing nor persuasive.

XVII. The Court erred in its failure to find that the design of the patent in suit failed to exhibit any inventive quality over the following prior art:

- (1) The catalog reference Exhibit J of the Western Auto Supply Co.
- (2) The license plate frames Exhibits C, D and K.
- (3) (a) Orester, *et al.*, Pat. No. 1,787,545 (1931);
(b) McRuer, *et al.*, Pat. No. 1,451,621 (1923);
(c) Gazan, Jr., Pat. No. Des. 167,885 (1952);
(d) Griffith, Pat. No. Des. 134,835 (1943);
(e) Watts, Pat. No. 1,536,414 (1925);
(f) Overton, Pat. No. 1,660,575 (1928).

XVIII. The Court erred in failing to find that the appellants have not made, sold or used anything inventive which is embodied in the design of the patent in suit.

XIX. The Court erred in concluding that final judgment should be entered in favor of the plaintiff with costs and disbursements and in entering such a judgment.

IV.

Summary of Argument.

1. Defendants-Appellants have not appropriated anything patentable from plaintiff's patented design.
2. The patent in suit is invalid since it involves no invention over the prior art.
3. The presumption of validity of the patent is seriously weakened because pertinent prior art was not considered by the Patent Office.
4. The standard of invention required for design patents is the same as that for mechanical patents; there must be originality in the exercise of the inventive faculty.
5. The similarity of goods of plaintiff and defendants is not involved in this appeal; the Count for Unfair Competition was dismissed at the trial.

POINT ONE.

Defendants-Appellants Have Not Appropriated Anything Patentable From Plaintiff's Patented Design.

The design of the patent in suit is primarily functional since the principal feature comprises the advertising material set forth in bold face letters. Furthermore, the design is merely utilitarian since the sole purpose is to provide advertising space on the upper and lower parts of the generally rectangular frame. The drawing attached to this brief shows the design of the patent in suit [Ex. 1] as compared to the design of the accused device [Ex. 2]. Also depicted in the drawing are the prior art designs of Western Auto Supply Co. [Ex. J-1] and The Douglas Company design [Ex. A-1]. It will be observed from the drawing that the design of the accused device is no closer to the design of the patent in suit than it is to the design of the prior art. The Western Auto frame [Ex. J-1] shows an enlarged advertising space on the top bar of the frame, and The Douglas frame [Ex. A-1] shows advertising matter on both the upper and lower bars of the frame. If the design of the patent in suit could be construed as involving any invention, clearly that invention is not present in the accused device, as shown by the drawing. Except for the advertising space and the particular advertising matter displayed, all four designs on the drawing are similar.

POINT TWO.

The Patent in Suit Is Invalid Since It Involves No Invention Over the Prior Art.

The attached drawing shows that there is no real difference of an inventive nature between the prior art and the design of the patent in suit. The frames are rectangular since they must encompass a rectangular license plate and the frames have similar open areas in the center to expose the lettering on the license plate. The dominating features of the various designs reside in the advertising space and advertising matter which is purely functional and utilitarian.

Moreover, the prior art designs shown on the attached drawing were not considered by the Patent Office before granting the Bessolo patent in suit. The same is true of the Orestes *et al.* Patent No. 1,787,545 [Ex. M] and McRuer Patent 1,451,621 [Ex. N]. Indeed the Patent Office Examiner was unable to locate any reference patents showing a "two line frame", that is, a license plate frame having advertising spaces both on the upper and lower bars.

In the argument advanced by Bessolo's counsel which resulted in allowance of the Bessolo application for patent, it was stated:

"the lower indicia surface is almost double the width of the upper indicia surface so that the lower surface indicia may be emphasized over the upper indicia." [Ex. G, pp. 7-8.]

It will be noted that the accused device does not have this feature which Bessolo's counsel argued before the Patent Office. Thus, the lower indicia surface of the accused device is smaller rather than larger as compared to the upper indicia surface.

That The Douglas Company Frame [Ex. A-1] was considered by plaintiff to be similar to the design of the Bessolo patent in suit shown by the fact that plaintiff's counsel sent a letter to The Douglas Company [Ex. B] charging that The Douglas Company license plate frame infringed the Bessolo patent in suit. It is clear from a consideration of the testimony of defendants' witnesses Huckelbury, Lenk, Sorenson and Bell that license plate frames having two lines of advertising indicia were manufactured and sold in the United States more than one year prior to the filing date of the Bessolo patent D-167,878 in suit, that is, more than one year prior to May 10, 1948. Thus, Huckelbury, in referring to Exhibit C testified that his company, The Benmatt Organization, made frames "just exactly like that in 1938" [R. 34]. Lenk testified that his company, Ace Stamp and Stencil Company made dies for frames like Exhibit C in 1940 [R. 47]. Sorenson testified that his company, Angelus Die Casting Company, made frames like Exhibit D in September, 1948 [R. 78]. Bell testified that his company, Shehan Manufacturing Company, made two-line frames prior to 1943 [R. 71].

That the testimony of these four disinterested witnesses is not to be disregarded is clear from the following 9th Circuit decisions:

In *Whiteman v. Mathews*, 216 F. 2d 712 (1954), at page 716, appears this statement:

"The burden of proof imposed upon a party tendering the issue of prior public use is a heavy one. It is not satisfied by a mere preponderance of the evidence, but is borne successfully only if the evidence is clear and satisfactory—perhaps beyond a reasonable doubt. *It is not the rule, however, that oral evidence is insufficient as a matter of law in all cases;*

nor does the rule require the trial court to discard credible testimony merely because it is oral and because it deals with events and circumstances long past. If the evidence as to prior public use is such that it would be accepted as satisfactory and convincing in any other kind of case, criminal or civil, then the degree of proof fixed by law to establish such use is attained. *Radio Corp. of America v. Radio Engineering Laboratories*, 293 U. S. 1, 7, 55 S. Ct. 928, 931, 79 L. Ed. 163; *Paraffine Companies, Inc. v. McEverlast, Inc.*, 9 Cir., 84 F. 2d 335, 339; *Rown v. Brake Testing Equipment Corp.*, 9 Cir., 38 F. 2d 220, 224; *International Carbonic Engineering Co. v. Natural Carbonic Products, Inc.*, D. C. Cal., 57 F. Supp. 248, 258, affirmed 9 Cir., 158 F. 2d 285; *Becker v. Electric Service Supplies Co.*, 7 Cir., 98 F. 2d 366.” (Emphasis added.)

King Gun Sight Company v. Micro Sight Company, 218 F. 2d 825 (1955), at page 827, is the statement:

“Oral testimony, if of sufficient reliability and cogency, is as effective as written or other demonstrative evidence to establish the invalidity of patents due to prior art. (Citing Whiteman v. Mathews, supra.)” (Emphasis added.)

POINT THREE.

The Presumption of Validity of the Patent Is Seriously Weakened Because Pertinent Prior Art Was Not Considered by the Patent Office.

As set forth in the Ninth Circuit case of *Gomez et al. v. Granat Bros., et al.*, 177 F. 2d 266 (1949):

“The presumption of *prima facie* validity of patent is greatly weakened, if not destroyed, when pertinent prior art is not considered by the Patent Office.”

The trial court had found the patent valid but this was reversed on appeal. The following supporting cases were cited in the appellate decision:

Stoddy v. Mills Alloys (9th Cir.), 67 F. 2d 807;

Mettler v. Peabody Engineering Corp. (9th Cir.),
77 F. 2d 56;

McClintock v. Gleason (9th Cir.), 94 F. 2d 115.

In *Norman Products Co. v. Sequoia Mfg. Co.*, 107 Fed. Supp. 928, the District Court (N. D. Cal., S. D.) (1952), stated at page 929:

"The presumption of *prima facie* validity which ordinarily attaches to a patent by reason of the issuance by the Patent Office, is dissipated when pertinent prior knowledge and prior art have been omitted from consideration by the Patent Office. *The presumption does not create validity of a patent as against pertinent prior art references which have not been considered.*" (Emphasis added.)

The Court cited:

Lane Wells Co. v. M. O. Johnston Oil Field Service Corp. (9th Cir.), 181 F. 2d 707 (1950);

Jacuzzi Bros. Inc. v. Berkeley Pump Co. (9th Cir.),
191 F. 2d 632 (1951).

The Patent Office did not consider the Western Auto frame nor The Douglas frame as shown on the attached drawing [Exs. J-1 and A-1, respectively] nor did the Patent Office consider the two line frames shown by the Orestor Patent No. 1,787,545 [Ex. M] nor the McRuer Patent No. 1,451,621 [Ex. N]. As a consequence of this failure to consider the most pertinent prior art, the presumption of validity must fail.

POINT FOUR.

The Standard of Invention Required for Design Patents Is the Same as That for Mechanical Patents; There Must Be Originality in the Exercise of the Inventive Faculty.

As set forth in the 9th Circuit case of *Magarian v. Detroit Products Co.*, 128 F. 2d 544 (1942):

“The design of the arm is streamlined and pleasing in appearance; but this is insufficient in the absence of invention.”

In that case, the 9th Circuit Court of Appeals held that Design Patent 109,148 covering a signal arm used on motor trucks and buses was invalid for lack of invention.

The following cases illustrate the strict construction placed on the validity of design patents. In each case the patent was held invalid for non-invention.

Western Auto Supply Co. v. American National Co., 114 F. 2d 711 (C. C. A. 6, 1940);

Koch Mfg. Co. v. Blue Star Auto Stores, Inc., 103 F. 2d 598 (C. C. A. 7, 1939);

General Electric Co. v. Parr Electric Co., 98 F. 2d 60 (C. C. A. 2, 1938);

Thabet Manufacturing Co. v. Kool Vent Metal Awning Corporation of America, 226 F. 2d 207 (C. C. A. 6, 1955);

Trojan Textile Corp. v. Crown Fabrics Corp., New York District Court decided 7-12-56, 110 U. S. P. Q. 231;

Spirt et al. v. J.F.D. Manufacturing Co., Inc., 132 Fed. Supp. 424 (1955).

In the *Western Auto Supply* case, *supra*, the Court held Design Patent 97,206 for a coaster wagon invalid for lack of invention. The Court said:

“If the variation sought to be patented is of such nature that it would naturally occur to one of average skill in the field, it is in reality in potential possession of the public, and to reward it with the monopoly of a patent would be out of harmony with the purpose and intent of the statute. When the idea is adapted or derived by analogy from prior usage, or when it is embodied in a design resembling the prior art in general appearance or central theme, there is no patentable invention. ‘Mere mechanical skill is insufficient,’ said Brown, J., in *Northrup v. Adams*, 12 Off. Gag. 430. ‘*There must be something akin to genius,—an effort of the brain as well as the hand.*’ The adaptation of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in their new role, is not invention.” (Emphasis added.)

In the *Thabet Manufacturing Co.* case, *supra*, the Court held Design Patent No. 154,550 on a Canopy invalid for lack of invention. The Court said:

“A design patent must disclose inventive originality in design and ornamentation, and *mere mechanical skill is no more sufficient to constitute inventive art in the case of the design artist than in the case of the engineer.* (Citing cases.)

“A design patent must be possessed of novelty; the adaptation of old devices to new purposes, however convenient or useful they may be in their new role, is not invention. *Western Auto Supply Co. v. American-National Co.*, *supra*; *Imperial Glass Co. v. A. H. Heisey & Co.*, 6 Cir., 294 F. 267. The degree of difference required to establish novelty occurs when

the average observer takes the new design for a different, and not a modified already existing design. Application of Johnson, 175 F. 2d 791, 792, 36 C. C. P. A. Patents 1175; Application of Abrams, 205 F. 2d 202, 203, 40 C. C. P. A. Patents 1045. The fact that a design may be distinguished from those found in the prior art does not import the required novelty and ornamentation; its overall aesthetic effect must represent a step which has required *inventive genius* beyond the prior art. Burgess Vibrocrafters v. Atkins Industries, 204 F. 2d 311, 314.” (Emphasis added.)

In the *General Electric* case, *supra*, Design Patent 98,076 for an electric fan was held invalid for lack of invention. The Court said:

“The Gosling patent shows a design which combines wide blades of special shape with the bullet-shaped nose or hub to produce an alleged new attractive design for an electric fan. Under it, the Silver Swan design of appellee is accused of infringement. The accusation is based on similarity of the bullet nose and the wide overlapping blades. The claim reads ‘the ornamental design for an electric fan as shown.’ The wide blades of the Upson patent are borrowed for this design. It required *no inventive thought* to employ the wide blades of Upson and to take the bullet shaped hub from the Noble patent No. 40,570 and draw a design of the combination. There was *no inventive thought* disclosed in this design. Dietz Co. v. Burr & Starkweather Co., 2 Cir., 243 F. 592; Strause Gas Iron Co. v. Wm. M. Crane Co., 2 Cir., 235 F. 126. An artisan with the Noble and Upson patents before him could put the wide blades of the latter on the tapered hub of the former. This patent must be held invalid.” (Emphasis added.)

In the *Koch Mfg. Co.* case, *supra*, Design Patent No. 104,111 for an automobile exhaust hood, it was held invalid for lack of invention. The Court said:

“Validity of a design patent must be backed by some originality, as well as by an eye appeal.”

In the *Trojan Textile* case, *supra*, the Court held a design patent on a Textile Fabric invalid as involving no invention, holding:

“It is clear that the requirement of invention for design patents is as high as it is for mechanical patents, and that the invention must rise sufficiently above the prior art in its uniqueness of composition and its aesthetic appeal as to constitute a true invention. *Blisscraft v. Rona Plastic Corp.*, 123 F. Supp. 552, 102 U. S. P. Q. 211 (S. D. N. Y. 1954), *aff'd* on opinion below, 219 F. 2d 238, 104 U. S. P. Q. 222 (C. A. 2, 1955); *Tourneau v. Tishman & Lipp*, 119 F. Supp. 593, 100 U. S. P. Q. 350 (S. D. N. Y. 1953), *aff'd* on opinion below, 211 F. 2d 240, 100 U. S. P. Q. 334 (C. A. 2, 1954).”

In the *Spirit* case, *supra*, the Court held a design patent on “Rabbit Ears” television antenna invalid as involving no invention, stating:

“I have not overlooked the fact that the Leonard Patent was considered by the Patent Office in the issuance of the plaintiff’s patent, as shown by the file wrapper in evidence. In my opinion the plaintiff’s patent does not meet the test of ‘invention’ necessary to establish validity. It is merely a variation of prior art, the preparation of which did not require uncommon or exceptional inventive skill or talent.”

POINT FIVE.

**The Similarity of Goods of Plaintiff and Defendants
Is Not Involved in This Appeal; the Count for
Unfair Competition Was Dismissed at the Trial.**

In the Complaint as originally filed there was a count for Unfair Competition based on the similarity of these license plate frames but the count was dismissed at the trial, and plaintiff relied solely upon his patent. The fact that one license plate frame looks like another license plate frame was commented on by the trial judge who said:

“On the matter of a design patent, I am off-hand, for one who is not an artist like Sir Joshua Reynolds, paintings look alike to me and they look different to others, and *all license holders look alike to me* but I suppose somebody who is an expert and an artist may see some distinction in a design, and it is not the utility, if I understand the law correctly.” [R. 169.] (Emphasis ours.)

Furthermore, the trial judge erred by comparing the *goods* of plaintiff with Exhibit 2 sold by defendants, rather than comparing the design of the patent with said Exhibit 2.

Conclusion.

The judgment of the District Court should be reversed.

Respectfully submitted,

LYON & LYON,

By JOHN B. YOUNG,

Attorneys for Appellants.

